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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JUAN JOSE GUTIERREZ, Defendant and Appellant.	B186612 (Los Angeles County Super. Ct. No. BA267004)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed.

Eric Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Paul M. Roadarmel, Jr., Deputy Attorney General, for Plaintiff and Respondent.

Juan Gutierrez appeals from the judgment entered following a jury trial in which he was convicted of murder and attempted murder, with further findings that he personally used and intentionally discharged a firearm during the commission of the offenses and that the offenses were committed for the benefit of a criminal street gang. Defendant contends that he was deprived of a fair trial because a witness referred to an uncharged offense and that trial counsel was ineffective in failing to seek suppression of his confession. We affirm.

BACKGROUND

In the early morning hours of November 30, 2003, Larry Hernandez and Fernando Arias were parked in Arias's taxi cab at 45th Street and Hooper Avenue in Los Angeles, where Arias was smoking methamphetamine. The area was claimed by various gangs, including the 38th Street gang. Hernandez saw a car drive past and park three or four houses in front of his location. A second car, with three people inside, then stopped next to Arias's cab. Defendant got out of the car and asked for Hernandez's and Arias's gang affiliation. Arias and Hernandez responded that they were not gang members. Defendant said he was from 38th Street and started shooting. Arias was hit five times, including a fatal gunshot wound to the head. Hernandez suffered nonfatal gunshot wounds.

On December 18, 2003, Hernandez met with a police sketch artist and assisted in the preparation of a composite picture of the shooter. The composite depicts a young man wearing a Los Angeles Dodgers baseball cap and states that he is 5 feet 7 inches tall and thin. Hernandez did not mention anything about the shooter's eyes. (Defendant's left eye is missing. In court, he wore a white patch over his left eye socket.)

In April 2004, defendant's cousin, Aron Flores, an admitted member of the 38th Street gang, was arrested for carjacking. Although at trial Flores recanted postarrest statements to police officers, he told officers that defendant admitted having shot and killed one person and having wounded another on 45th Street while in the company of

Ivan Munoz.[1] Defendant further told Flores that after the shooting he and Munoz hid out in Mexico.

On May 18, 2004, Hernandez was called to the police station to view photographs of suspects. Hernandez arrived with a copy of a Los Angeles Police Department "wanted" poster that he had printed from the Internet. The poster was of 38th Street gang member Jamie Alvarez, who was wanted for murder in an incident where "[t]he suspect approached the victim on foot. The suspect then shot the victim several times before fleeing in an awaiting vehicle." Hernandez told the officers that Alvarez was the shooter in this case. Hernandez did not identify any other suspects while at the station.

Defendant was arrested on June 5, 2004, and was interviewed that day by Detective Salaam Abdul. During the interview, defendant admitted being at the scene but claimed that Munoz had shot Hernandez and Arias. Defendant was not booked for murder, but remained in custody on another charge following the interview. Munoz was arrested on June 18.

On June 22, Hernandez identified defendant from a six-pack lineup that contained a photograph of defendant taken upon defendant's June 5 arrest. (A white bar was placed on the photos over the left eye of each of the participants in the lineup.) Hernandez told officers that he had been mistaken in his May 18 identification and was sure that defendant was the person who shot him. Hernandez later identified defendant at the preliminary hearing and at trial.

Detective Abdul interviewed defendant for a second time on June 23, 2004. During this interview, defendant said that Munoz was the driver and that he, rather than Munoz, had personally shot both victims.[2]

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[1] Munoz was charged in this case as an accessory after the fact, but the prosecution against him was severed before trial.

[2] Neither of defendant's interviews with Abdul were tape-recorded in full, with a recorder being turned on each time only after defendant had waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. At trial, the *Miranda* waivers were established
(footnote continued on next page)

A gang expert testified that defendant was an active member of the 38th Street gang. The shooting took place in the territory of the gang, which was involved in the commission of various felonies. The expert was of the opinion that the shooting was committed for the benefit of the gang.

In defense, defendant's sister testified that defendant received treatment in 2002 for a gunshot wound to his eye and normally wore a white gauze eye patch over his empty eye socket. After defendant was booked, defendant's sister received a threatening telephone call.

In closing argument to the jury, defense counsel challenged the accuracy of Hernandez's identification, noting that Hernandez had failed to say anything about defendant's missing eye and had incorrectly described defendant's height (defendant stood before the jury during the trial). Counsel further noted that Hernandez had initially identified the photograph of someone other than defendant. In addition, counsel urged that defendant's initial statement to the police, that the shooting had been done by Munoz, was correct and should be believed by the jury.

DISCUSSION

1. Reference to Uncharged Offense

During direct examination of Detective Abdul, it was established that defendant had been arrested on June 5, 2004. The prosecutor asked if defendant had been interviewed after his arrest, and Abdul responded: "Well, at the time that [defendant] was arrested, he was not arrested for our murder. He was arrested for some other case . . . ." Abdul's testimony then turned to the substance of defendant's June 5 statement. The following ensued:

(footnote continued from previous page)

through Abdul's testimony, and the tapes of the statements and transcripts of the tapes were admitted into evidence.

"Q [By the Prosecutor]: Was there any conversation where [defendant] spoke off tape before you started?

"A [Abdul] Yes.

"Q What was that about?

"A [Defendant] started talking about his robbery that he had.

"[Defense Counsel]: Objection.

"The Court: The objection is sustained. The answer will be stricken."

Questioning thereafter continued, with Abdul explaining that he tried to establish a rapport with defendant before turning on the tape recorder.

Later in the proceedings, when Abdul was about to testify regarding defendant's June 23 statement, the court called counsel to sidebar and the following colloquy ensued:

"The Court: I want to avoid anything having to do with this robbery. I don't know. Is that going to come up? I don't know.

"[The Prosecutor]: I don't think so, but let me be specific in my question.

"The Court: I want to avoid any other crime issues, if there are any.

"[The Prosecutor]: Sure.

"The Court: Okay, thank you."

We reject defendant's contention that Abdul's reference to the robbery deprived him of a fair trial.

To be sure, reference to an uncharged robbery unnecessarily injected potentially prejudicial information into the trial. (See, e.g., *People v. Harris* (1994) 22 Cal.App.4th 1575, 1580 [although not responsive to the question, witness mentioned defendant's parole status]; *People v. Allen* (1978) 77 Cal.App.3d 924, 934 [same].) And although defendant did not request a mistrial or move for a new trial based on the reference, it is established that "[w]hether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court. [Citation.]" (*People v. Harris*, *supra*, 22 Cal.App.4th at p. 1581.)

We perceive of no prejudicial harm to defendant. The reference to the robbery was brief and was stricken by the trial court, which later instructed the jury under CALJIC No. 1.02 that such testimony should be ignored. In addition, defendant had been identified as the triggerman by the victim of the attempted murder, had admitted his participation to his cousin, and had confessed to the police. Accordingly, defendant's contention must be rejected.

2. Ineffective Assistance of Counsel

Defendant did not move in the trial court to suppress his confession. Accordingly, no Evidence Code section 402 hearing was held at which evidence regarding the confession might have been adduced. Defendant nevertheless contends that the tape recordings and transcripts of his interviews with Detective Abdul demonstrate that his confession was coerced. As a consequence, defendant argues, trial counsel rendered constitutionally ineffective assistance in failing to make a suppression motion. We disagree.

Abdul's June 5 interview with defendant was a lengthy battle of wills. During the interview, defendant first asserted that Munoz had shot the victims and that defendant himself was in Mexico at the time. Abdul insisted that he had solid information regarding defendant's presence at the scene, but that he did not blame defendant for the shooting. Rather, Abdul focused on having defendant identify the shooter. Defendant's initial responses were to deny that he was at the scene.

As the June 5 interview continued, defendant discussed the possibility of his going to jail. He also asked to call his sister. Abdul persisted in questioning defendant, saying, "What happened? Juan, if I was in a situation where somebody got killed and they came at me and said . . . we know it happened, right? Of course, I'm gonna think I'm going to jail. But I'm going to say how we going to fix this thing? How can we make this a little better?" Later, continuing on the topic of defendant going to jail, Abdul said, "We're not even talking about jail. We don't know what we're gonna do yet. You continually, you're continually, continually lying to me. . . . Instead of you telling the truth and we could try to . . . make this thing better. To fix this." As to defendant's request to talk to

his sister, Abdul said he would let defendant call her "after you tell the truth." Yet later, Abdul asked, "What car were you in? The first one or the second one? . . . Look . . . in my eyes. Were you in the first one or the second one? I'm trying to help you here." "[I]f you sit here and constantly lie, and constantly deny it, that's gonna hurt you." (During this portion of the interview, Abdul also told defendant on several occasions that he could not make any promises about what would happen.)

Toward the end of the June 5 interview, defendant admitted that he was at the scene. Nevertheless, he continued to assert that Munoz was the shooter, claiming that he and Munoz were in different cars. (As noted, it was during defendant's second interview with Abdul, on June 23, 2004, that defendant admitted he was the shooter.)

"To establish constitutionally ineffective assistance of counsel under either the state or federal constitutional right to counsel, appellant must demonstrate (1) that his attorney's performance fell below an objective level of reasonableness, i.e., that counsel's performance was not within an objective level of reasonableness and thus did not meet the standard to be expected of a reasonably competent attorney, and (2) that he suffered prejudice as a result of that failure. Prejudice is established if there is a reasonable probability that, absent counsel's errors, the result would have been different. [Citations.] . . .

"In addition, however, when the reason for counsel's action or inaction is apparent on the record, the court will determine whether that reason reflects reasonably competent performance by an attorney acting as a conscientious and diligent advocate. If no explanation appears, an ineffective counsel claim will be rejected unless the attorney was asked for and did not offer an explanation, or there can be no satisfactory explanation. [Citation.] In other cases the appellant is left to his remedy on habeas corpus where evidence outside the record may shed light on the reason for the attorney's action." (*People v. Coddington* (2000) 23 Cal.4th 529, 651–652, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

"A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity. [Citations.] . . . [¶] In deciding the

question of voluntariness, the United States Supreme Court has directed courts to consider 'the totality of circumstances.' [Citations.] Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 635, 659–660.)

"In general, '"any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law."' [Citations.] In identifying the circumstances under which this rule applies, [the Supreme Court has] made clear that investigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 339–340.)

Defendant does not argue that his June 23 statement in which he confessed was involuntary per se. Rather, he first addresses the prejudice prong of ineffective assistance, arguing that his June 5 statement was coerced and that the June 23 confession was a "poisoned fruit" of the June 5 statement. Second, defendant argues that the June 23 confession "cannot be deemed voluntary in the absence of a hearing as to what happened during the custodial conversation that occurred prior to the tape recorded portion. Had counsel made a timely motion to suppress the confessions, the issue would have been litigated at the trial level, and the record may very well demonstrate that the interrogating officers on June 2[3] made explicit and express use of the prior involuntary statements to extract the follow-up confession."

Defendant's second argument implicates what a reasonably competent attorney would have done. But, as such, the argument turns the ineffective assistance standard on its head. This is not a situation where the appellate record standing alone provides

sufficient basis to assess counsel's competence. (See, e.g., *People v. Nation* (1980) 26 Cal.3d 169, 179.) As the record now stands, we are left with nothing but speculation regarding what might have been shown if evidence had been taken at the trial level on the issue of what happened during the non-recorded parts of the interviews, or in the interim period between the two interviews. Nor does the record shed light on other relevant circumstances surrounding the interview that are to be considered in determining voluntariness, such as the conditions under which the interviews were conducted and defendant's maturity, education, and mental health. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 660.) Accordingly, defendant cannot satisfy the ineffective assistance requirement of showing that counsel's performance was not within an objective level of reasonableness.

With respect to defendant's first argument, which goes to the prejudice aspect of his ineffective assistance claim, the evidence adduced at trial, including the recorded portions of the two interviews, does not compel the conclusion that Abdul was utilizing "psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Ray*, *supra*, 13 Cal.4th at p. 340.) In addition, even assuming that Abdul made improper promises of leniency, for defendant to prevail those promises must be a "motivating cause of the confession." (*Id*. at p. 339.) There is nothing in the appellate record upon which to base a conclusion that Abdul's allegedly improper exhortations, all of which were made during the June 5 interview in which defendant continued to deny culpability, motivated defendant's confession on June 24. (Cf. *People v. Sims* (1993) 5 Cal.4th 405, 445; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041, fn. 3.) Accordingly, defendant's ineffective assistance of counsel claim must fail.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

I concur:

ROTHSCHILD, J.

I concur in the judgment only.

VOGEL, J.